

## Chapter X

# HEARINGS: MEDICAL QUALITY HEARING PANEL

### A. General Description of Functions

Housed within the Department of General Services, the Office of Administrative Hearings (OAH) is a centralized panel of administrative law judges (ALJs) who preside over state agency adjudicative hearings in a variety of areas. OAH is headed by a director (also called the chief administrative law judge) appointed by the Governor. The Office currently employs the director, four presiding judges, and 34.4 ALJs based in four California cities (Sacramento, Oakland, Los Angeles, and San Diego).

As noted in Chapter IV, a special panel of ALJs called the Medical Quality Hearing Panel (MQHP) was created in OAH in 1990's SB 2375 and refined in 1993's SB 916.<sup>220</sup> The purpose of the creation of the MQHP is to enhance the expertise and independence of the ALJs who preside over physician discipline hearings. First, the statute enables the MQHP ALJs to specialize in physician discipline matters; it limits the number of ALJs who may be appointed to the MQHP by the OAH executive director,<sup>221</sup> and requires an MQHP ALJ to preside over MBC adjudicative hearings.<sup>222</sup> The statute also declares that the MQHP ALJs "shall have medical training as recommended by the Division of Medical Quality . . . and approved by the Director of the Office of

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<sup>220</sup> See *supra* Ch. IV.C. and Ch. IV.D.

<sup>221</sup> Gov't Code § 11371(a)-(b). As enacted in 1990 in SB 2375 (Presley), these sections granted wide discretion to the OAH Director in determining which and how many ALJs to appoint to the MQHP. Opposed to the provision creating the MQHP because it violates OAH's tradition of providing a "pool" of judges available to hear all types of hearings, and armed with the broad language in SB 2375, the OAH Director in 1991 appointed all 27 ALJs in OAH to the MQHP, defeating the "specialization" intent of the statute. See *supra* Ch. IV.C. SB 916 (Presley) added the specific limit on the number of ALJs who may be appointed to the MQHP. These sections provide that the OAH Director must appoint at least five full-time ALJs but not more than 25% of the total number of ALJs in OAH to the MQHP. Currently, 13 full-time ALJs are on the MQHP — 33% of the ALJs at OAH (including the presiding ALJs and the chief ALJ).

<sup>222</sup> Gov't Code § 11372. SB 916 (Presley) (Chapter 1267, Statutes of 1993) abolished the Board's physician-dominated Medical Quality Review Committees, which had been authorized to preside over MBC disciplinary hearings, and directed MQHP ALJs to preside over all hearings. According to a legislative analysis of SB 916, "supporters argue that the shift is necessary to provide fair hearings and eliminate the appearance of doctors protecting colleagues." Assembly Health Committee, *Bill Analysis of SB 916 (Presley)* (Aug. 25, 1993).

Administrative Hearings.”<sup>223</sup> Additionally, the statute requires the OAH director, with the advice of MBC, to appoint “panels of experts” to provide assistance to ALJs who may have difficulty with the expert witnesses paid by the parties. “These panels of experts may be called as witnesses by the administrative law judges of the panel to testify on the record about any matter relevant to a proceeding and subject to cross-examination by all parties.”<sup>224</sup> With the creation of the specialized ALJ panel, the Legislature — for the first time — felt comfortable authorizing those judges to entertain motions for and issue interim suspension orders restricting or suspending the license of a physician pending the conclusion of the disciplinary matter, as an alternative to the temporary restraining order remedy in superior court.<sup>225</sup>

Once an accusation has been filed by HQE and the respondent files a notice of defense, the parties approach OAH for a hearing date; the procedure for securing a hearing date varies from northern to southern California.<sup>226</sup> Effective July 1, 2004, OAH adopted a new policy requiring it to calendar hearings to start within 90 days of the date both parties are available; in no event will the first day of the hearing be scheduled more than 210 days from the date OAH receives the request for hearing.<sup>227</sup> Prior to the evidentiary hearing, the assigned ALJ may entertain and rule on discovery disputes<sup>228</sup> and hold prehearing conferences to clarify issues, make rulings on witnesses and objections to proffers of evidence, establish the order of presentation of evidence and witnesses, require the exchange of witness lists and exhibits or documents to be offered in evidence at the hearing, and explore the possibility of settlement.<sup>229</sup> OAH may also conduct formal settlement conferences prior to the hearing in an effort to avoid litigation.<sup>230</sup>

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<sup>223</sup> *Id.* at § 11371(a).

<sup>224</sup> *Id.* at § 11371(d).

<sup>225</sup> *Id.* at §§ 11372(b), 11529.

<sup>226</sup> In southern California, OAH usually conducts an immediate telephonic trial-setting conference with the parties in order to schedule a hearing date, which is preceded by one or two scheduled settlement conferences. In northern California, OAH permits the parties to explore settlement opportunities first; only if settlement negotiations fail does OAH schedule a hearing date.

<sup>227</sup> OAH’s July 1, 2004 policy replaced a prior policy requiring it to calendar hearings to start within 120 days of the date that both parties are available; there was no outer limit.

<sup>228</sup> *See* Gov’t Code § 11507.7.

<sup>229</sup> *See id.* at § 11511.5.

<sup>230</sup> *See id.* at § 11511.7. The ALJ who is assigned to the matter may not conduct the settlement conference unless the parties so stipulate.

Evidentiary hearings on accusations filed by MBC are presided over by an MQHP ALJ. During the hearing, each party has the right to examine and cross-examine witnesses, present documentary evidence, and present oral argument.<sup>231</sup> Following submission of the evidence, the ALJ prepares a written decision including findings of fact, conclusions of law, and recommended discipline.<sup>232</sup> At the Board's request, the ALJ may also recommend that the licensee pay "cost recovery" to reimburse the Board for its investigative and enforcement costs incurred up to the first day of the evidentiary hearing.<sup>233</sup> The ALJ's ruling is a "proposed decision,"<sup>234</sup> which is forwarded to the Division of Medical Quality (DMQ), which makes the final agency decision (see Chapter XI).

In recommending discipline, the MQHP ALJ is guided by a set of "disciplinary guidelines" approved by DMQ; these guidelines set forth the Division's preferred range of sanctions for every given violation of the Medical Practice Act and the Board's regulations.<sup>235</sup>

Exhibit IX-A above reflects the "throughput" of MBC investigations into HQE, and HQE accusations into OAH. In the past five years, HQE has filed an annual average of 270 accusations and 22 petitions to revoke probation. Due to the large number of post-filing settlements, the MQHP has presided over an average of 44 MBC disciplinary hearings annually for the past five years. Government Code section 11517(c)(1) requires ALJs to submit a proposed decision to DMQ within 30 days of submission of all the evidence. Exhibit X-A below indicates that — over the past three years — it took MQHP ALJs an average of 35 days to submit proposed decisions. Although this is slightly longer than the statute permits, it is much better than OAH's 120-day average in 1994. However, HQE DAGs have expressed concern that some decisions take over 90 days; in one egregious case seeking revocation, seven months elapsed between case submission and completion of the proposed decision.

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<sup>231</sup> *Id.* at § 11513.

<sup>232</sup> *Id.* at § 11425.50.

<sup>233</sup> Bus. & Prof. Code § 125.3.

<sup>234</sup> Gov't Code § 11517.

<sup>235</sup> Effective July 1, 1997, Government Code section 11425.50 requires occupational licensing boards to codify their disciplinary guidelines in their regulations. MBC has adopted section 1361, Title 16 of the California Code of Regulations, which incorporates by reference the 2003 version of the Board's disciplinary guidelines.

### Ex. X-A. HQE/OAH/DMQ Average Cycle Times

	Activity	FY 2001–02	FY 2002–03	FY 2003–04
HQE	MBC transmittal → HQE filing of accusation	103 days	91 days	107 days
HQE/ OAH	Estimated time from filing of accusation → conclusion of hearing/ submission of stipulation <sup>236</sup>	351 days	379 days	443 days
OAH	Case submission to ALJ → submission of proposed decision to DMQ	35 days <sup>237</sup>	36 days <sup>238</sup>	35 days <sup>239</sup>
DMQ	Receipt of proposed decision → DMQ final decision	51 days <sup>240</sup>	56 days <sup>241</sup>	30 days <sup>242</sup>

Source: Medical Board of California

## B. Initial Concerns of the MBC Enforcement Monitor

Due in part to the 2003 Administration change (and an April 1, 2004 change in leadership at OAH) and in part to the press of other issues that we were required to address in this report, the Monitor did not examine OAH’s performance in-depth during the first year of this project. During the second year, we plan to look at the following issues.

### 1. OAH was impacted by the hiring freeze and budget cuts.

OAH was not immune from the October 2001 hiring freeze or the subsequent position “sweeps” and budget cuts. OAH lost two ALJ positions and a number of support staff positions. The OAH Director has stated that these losses have not directly impacted the MQHP, but they have affected the office as a whole. OAH has requested eight new ALJ positions and four support staff positions.

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<sup>236</sup> We generated this estimated figure by subtracting average ALJ proposed decision drafting time (presented above) and average DMQ decision time (presented above) from the *MBC Annual Report’s* calculation of the average length of time from accusation filing to final case disposition.

<sup>237</sup> This figure includes 7 cases that exceeded 90 days.

<sup>238</sup> This figure includes 4 cases that exceeded 90 days.

<sup>239</sup> This figure includes 6 cases that exceeded 90 days.

<sup>240</sup> This figure includes 16 nonadoptions.

<sup>241</sup> This figure includes 12 nonadoptions.

<sup>242</sup> This figure includes 5 nonadoptions.

**2. The time it takes to schedule and conduct evidentiary hearings is lengthy.**

Exhibit X-A above indicates an estimated average 443-day period between filing of the accusation and conclusion of the evidentiary hearing — over 14 months. Some of these hearings are one- or two-day matters; others should last weeks but — due to the schedules of the attorneys, respondent, and judge — must be conducted in many non-contiguous blocks over the course of many months. Based on a limited review, it seems that the delay in scheduling and conducting MBC hearings is not due to a shortage of judges or bureaucratic limitations on OAH's part. Instead, it appears that the understaffing in HQE's Los Angeles office<sup>243</sup> (which normally files approximately 60% of all accusations in California) and the limited number of defense counsel who regularly defend physicians in MBC disciplinary matters account for much of the delay in scheduling and holding hearings. In short, there are too few attorneys on both the prosecution and defense sides, and all of these attorneys are "booked" many months in advance. OAH believes that it is setting hearings well within the timelines established in its July 1, 2004 policy, but is forced to postpone scheduled hearings because the parties request continuances. In OAH's view, it has sufficient MQHP ALJs to hear cases more rapidly than they are being heard — but they can't, due to a shortage of attorneys in HQE and the limited number of defense attorneys who handle MBC cases.

**3. DMQ members perceive that MQHP ALJs are not following MBC disciplinary guidelines.**

Exhibit XI-A below indicates that, during 2001–02 and 2002–03, DMQ nonadopted an unusually high number of proposed ALJ decisions: 25% in 2001–02 and 28% in 2002–03. An October 2002 memo from one DMQ member expresses concern that "some [ALJs] do not follow the Board's Disciplinary Guidelines when imposing discipline in physician cases."<sup>244</sup> Although the percentage of nonadoptions declined to 16% in 2003–04, the Monitor will attempt to examine whether ALJs are adhering to MBC's disciplinary guidelines.

**4. Whether ALJs are receiving medical training as authorized by Government Code section 11371 is unclear.**

As noted above, one of the ways in which SB 2375 (Presley) and SB 916 (Presley) sought to enhance the expertise of MQHP ALJs was to provide them with medical training "as

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<sup>243</sup> See *supra* Ch. IX.B.2.

<sup>244</sup> Ronald H. Wender, MD, Chair, MBC Enforcement Committee, *New Proposal for Reorganization of the Enforcement Program* (Oct. 7, 2002).

recommended by the Division of Medical Quality . . . and approved by the Director of the Office of Administrative Hearings.”<sup>245</sup> It is unclear whether ALJs are receiving medical training.

**5. ALJs rarely make use of their authority to call their own expert witnesses.**

Another way in which SB 2375 (Presley) sought to enhance both the expertise and independence of the MQHP ALJs was to provide them with a panel of expert witnesses. If confronted with diametrically opposed expert witnesses paid by the parties, this mechanism enables the ALJ to call his/her own expert to the stand “to testify on the record about any matter relevant to a proceeding and subject to cross-examination by all parties.”<sup>246</sup> We asked dozens of HQE prosecutors and investigators whether any MQHP ALJ had ever utilized this mechanism; one prosecutor remember one ALJ in the past 14 years who has called an expert from that panel.

**6. Should ALJs be authorized to enforce administrative subpoenas?**

As noted throughout this report, medical records procurement is one of the most serious issues confronting MBC and HQE. MBC and HQE must agree on a new strategy for expediting the prompt production of medical records by physicians and health care institutions. One time-consuming aspect of the existing process is that subpoena enforcement is available only in superior court. Research and inquiry should be performed as to whether MQHP ALJs should be authorized to enforce subpoenas issued by MBC, as a means of expediting medical records procurement.

**C. Initial Recommendations of the MBC Enforcement Monitor**

As noted above, the Monitor did not examine OAH extensively during the first year of this project. The Monitor intends to look into the above-described issues and others during the second year of the project, and report on OAH in the next report.

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<sup>245</sup> Gov’t Code at § 11371(a).

<sup>246</sup> *Id.* at § 11371(d).